No. 98-1687 (12)

IN THE
Supreme Court of the United States

GEORGE SMITH, Warden,
Petitioner,

v.

LEE ROBBINS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* RETIRED JUSTICES ARMAND ARABIAN, EDWARD T. BUTLER, ROBERT FEINERMAN, CHARLES W. FROEHLICH, JR., JOSEPH R. GRODIN, ROBERT F. KANE, J. CLINTON PETERSON, MICHAEL J. PHELAN, ROBERT K. PUGLIA, RICHARD SCHAUER, ROBERT S. THOMPSON, EDWARD J. WALLIN, AND GEORGE N. ZENOVICH IN SUPPORT OF RESPONDENT

GREGORY R. SMITH *
IRELL & MANELLA LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067
(310) 277-1010
Counsel for Amici Curiae

* Counsel of Record

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QUESTION PRESENTED

Whether California's no-merit procedure in criminal matters, whereby counsel do not identify issues to the California Courts of Appeal, compromises the effectiveness and efficiency of appellate review.

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INTEREST OF *AMICI CURIAE* [1]

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, *amici curiae* submit this brief in support of respondent Lee Robbins. *Amici curiae* are

[1] Pursuant to Rule 37.6, this brief was written entirely by counsel for *amici curiae*, and no outside contributions were received for its preparation or submission.

retired justices of California's Supreme Court and Courts of Appeal. *Amici curiae* have a unique understanding of the manner in which the California appellate courts actually review appeals submitted on a no-merits brief and the consequences of those briefs on the appellate process. As retired justices, *amici curiae* have an interest and personal responsibility to make the appellate process meaningful and manageable, and to further the effective administration of justice.

SUMMARY OF ARGUMENT

Under current California practice, counsel appointed to represent indigent defendants on appeal are permitted to file no-merit briefs (so-called "*Wende* briefs") which summarize the factual record but which do not call the reviewing court's attention to issues which might arguably support the appeal. In a *Wende* brief, counsel requests the appellate court to undertake its own independent review of the record. This no-merit procedure impacts the administration of the appellate courts in a number of ways.

- *First*, it requires the appellate court, already overburdened, to conduct an independent review of a cold record without the assistance of counsel who are likely to be more sensitive to what actually occurred at trial.

- *Second*, it requires the appellate court to duplicate counsel's efforts to identify arguable legal issues, and thus to expend greater judicial resources than might be necessary were the guidance of legal counsel provided.

- *Third*, it requires so little of counsel that it may actually encourage the filing of no-merit briefs.

Each of these consequences potentially impacts the fairness of the review process.

ARGUMENT

A. California's *Wende* procedure requires overburdened appellate courts to conduct an independent review of the entire record without the assistance of counsel.

The workload facing California's intermediate appellate courts is very large. In fiscal year 1997-98, the 93 justices of the California Courts of Appeal each authored, on average, 146 opinions, with a high of 170 majority opinions per justice in California's Fourth Appellate District. *See* Judicial Council of California, Administrative Office of the Courts, 1999 Court Statistics Report, at 18 fig. 3 (1999). There were 7,993 criminal appeals during the same period, constituting half of all appeals filed. *See id.* at 26 tbl. 4. Over the ten-year period ending in fiscal year 1997-98, criminal appeals rose by nearly 30 percent. *See id.* The Warden estimates that as many as 20-24 percent of all opening briefs filed in criminal and juvenile appeals are so-called *Wende* briefs.[2] *See* Petition for Writ of Certiorari at 7.

The increasing caseload of California's Courts of Appeal requires effective methods of administration if all parties in all cases are to receive the fair and knowledgeable review to which they are entitled, and for which the California courts consistently strive. The *Wende* procedure aggravates the already heavy burden of the appellate caseload.

In *Anders v. California*, 386 U.S. 738, 744 (1967), this Court held that appointed counsel who believe their client's apeal is frivolous must provide the reviewing court with a brief "referring to anything in the record that might arguably support the appeal." This procedure was intended to facilitate the appellate court's own independent review of the trial court proceedings. ***See, e.g., McCoy***

[2] *People v. Wende*, 25 Cal.3d 436, 600 P.2d 1071 (1979).

v. Court of Appeals of Wis., 486 U.S. 432, 442 (1988); *Anders*, 386 U.S. at 744. Thus, for example, in *Penson v. Ohio*, 488 U.S. 75, 81 (1988), the Court noted that the "cold record" may not "accurately and unambiguously reflect all that occurred at the trial," which counsel may be in a better position to uncover. *Id.* at 82 n.5. By articulating the issues that might be explored, and identifying those portions of the record which relate to each issue, the no-merits brief can provide a starting point and structure for the court's analysis.

It is useful for defendant's legal counsel to perform this analysis because, among other reasons, that counsel either participated at trial or is likely to have access to trial counsel. Thus appellate counsel will either have, or can obtain, an understanding of the record which may be difficult to obtain from an unassisted review.

The procedure used by the California appellate courts is of far less assistance. A *Wende* brief, such as the one filed in this case, presents a factual summary of the defendant's case, accompanied by a request that the appellate court itself review the record for arguable issues. The California appellate court is thus left on its own to review the complete record, in what is essentially a vacuum, without any direction, let alone assistance of counsel.

The *Wende* brief that is the subject matter of the present proceeding illustrates the negligible guidance such briefs offer the reviewing court. The brief consisted of a statement of the case, setting forth the charge, the date of trial, the verdict and the sentence, followed by a six-page descriptive summary of the historical facts of the case. This summary defined no issues, cited no legal authority, and failed to present any legal analysis. A review of the summary provides little assistance. An appellate court that received this brief would have to start afresh,

reviewing the entirety of the record looking for objections or other error, and attempting to get a complete picture of the lower court proceedings to determine whether error, if any, was exacerbated or remedied as the trial progressed.

By requiring the appellate court to start its review *de novo*, there is an inherent risk that already overworked courts will be even further overburdened, with the consequence that not only the particular case in which the *Wende* brief has been filed, but all cases, will get less attention. There is also a risk that the review of the cold record will be more perfunctory without the issue-spotting guidance, and associated record citations, of counsel. It may be this feature of California's no-merits procedure which is reflected in a national survey in which all six California appellate districts reported that they devoted less time to *Wende* appeals than to the average case. *See* Martha C. Warner, *Anders in the Fifty States: Some Appellants 'Equal Protection is More Equal than Others'*, 23 Fla. St. U. L. Rev. 625 (1996).

The reality in California is that overworked appellate courts must decide a very high percentage of their docket from a cold record without the assistance of counsel. This may result in a defendant in a no-merits appeal receiving both less and more attention than he or she would were issues articulated—less because of the inertia inherent in requiring a court to inspect from scratch a possibly large and intimidating but cold record, and more because a meaningful review could be done more easily were the court to have available a brief that defined issues and cited the evidence related to those issues.

California's no-merits procedure burdens the appellate process in an additional way: It makes more difficult the court's determination of whether counsel "has provided

the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal." *McCoy*, 486 U.S. at 442; see also *Penson*, 488 U.S. at 82. The factual summary popular under *Wende* merely demonstrates to the court that counsel read through the record. It does not assist the court in determining whether counsel provided the minimum level of *legal* representation required by *Anders* and its progeny. Obviously, counsel must do more than gain a familiarity with the facts of the appellant's case. "The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal." *McCoy*, 486 U.S. at 438. A mere restatement of the facts of the appellant's case does not aid the reviewing court in deciding whether the appellant received the diligent and thorough assistance of appellate counsel.

B. The *Wende* procedure requires a wasteful duplication of effort.

When a California appellate court receives a *Wende* brief, it assigns the case to a staff attorney who prepares a memorandum analyzing all possible legal issues in the case. Typically, the staff attorney then makes an oral presentation to the appellate panel and explains whether the case presents any arguable issues for appeal. *See* J. Clarke Kelso, *Special Report on California Appellate Justice: A Report on the California Appellate System*, 45 Hastings L. J. 433, 461 (1994). Thus, as Professor J. Clarke Kelso remarked in a report prepared for California's Appellate Courts Committee, Commission on the Future of the Courts, "the *Wende* process duplicates in all relevant aspects the exact process that appellate counsel must follow in evaluating the merits of the case." *Id.*

Although the *Wende* procedure is capable of masking incompetent or slothful counsel, *amici curiae* are confident that a majority of appointed counsel who determine an appeal to be frivolous have come to this conclusion only after they have identified, explored, and researched all of the possible legal arguments they might raise on behalf of their clients. But this simply underscores the inefficiency of the *Wende* procedure. Because counsel provides no identification of issues—no memorialization of the issues diligently explored—the appellate court is forced to redo without guidance everything that defendant's counsel has already done, but at considerable additional cost.

This ineffiicency is especially unfortunate in light of the considerable financial commitment California has made to provide appellate counsel for indigent defendants. In fiscal year 1996-97, the State of California budgeted over $44 million for this purpose. *See* Judicial Council of California, Administrative Office of the Courts, 1998 Annual Report II, at 62 (1998). Regrettably, these funds result in minimal benefits for either defendants or the judicial system itself in appeals submitted by way of *Wende* briefs.

C. By requiring too little of counsel, and too much of the reviewing court, California's procedure may encourage the filing of *Wende* briefs.

One purpose of the *Anders* brief is to discourage the filing of no-merit briefs in cases where counsel could, in good conscience, file a brief on the merits. By requiring counsel to refer to anything in the record arguably supporting the appeal, "the temptation to discharge an obligation in summary fashion is avoided." *Penson*, 488 U.S. at 82 n.4. The *Anders* brief imposes a certain measure of discipline on counsel. Indigent defendants' right to counsel on appeal is thereby advanced and more cases can be reviewed in the traditional manner.

In contrast, the available evidence suggests that California's *Wende* procedure may encourage the filing of no-merit appeals. According to a survey of states' *Anders* procedures, the three states that do not require counsel to reference arguable issues in their no-merit briefs—California, Arizona [3] and Oregon [4]—had a greater percentage of no-merit appeals than states strictly complying with *Anders*. The survey, based on 1993-94 data, found that those three states heard a total of 12,964 criminal appeals, of which 17.5% (2271 cases) were no-merit appeals.[5] *See* Martha C. Warner, *Anders in the Fifty States: Some Appellants 'Equal Protection is More Equal than Others'*, 23 Fla. St. U. L. Rev. 625 (1996). In contrast, among the states following *Anders*, the average rate of no-merit appeals is only 8.5% (4577 Anders briefs filed in a total of 53,862 criminal appeals).[6] *Id.* While this survey reveals wide variations in the rate of no-merit appeals between states strictly complying with *Anders*—in fact, in some cases, there are wide variations between

[3] *See State v. Clark*, No. ICA-CR 97-0673, 287 Ariz. Adv. Rep. 7, 8 n.1, 1999 WL 16739 (Ariz. Ct. App. Jan. 19, 1999); *State v. Scott*, [illegible] P.2d 551, 555 n.4 (Ariz. Ct. App. 1996).

[4] *See State v. Balfour*, 814 P.2d 1069, 1079-80 (Or. 1991).

[5] These figures may be higher today. In its *amicus* brief on behalf of respondent, Arizona notes that now more than 20% of all criminal appeals in the state are *Anders* cases. *See* Brief of Amici Curiae States of Arizona, *et al.* in Support of Petitioner at 14. California intimates that its own rate of *Wende* appeals may now be as high as 20-24 percent. *See* Petition for Writ of Certiorari at 7.

[6] This figure excludes those states that have adopted a formal or informal policy against the filing of *Anders* briefs, where counsel instead presents a brief on the merits even if counsel believes the appeal is frivolous. These states are: Alaska, Colorado, Georgia, Hawaii, Idaho, Indiana, Kansas, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, and North Dakota. Warner, *supra*, 23 Fla. St. U. L. Rev. at 643-51.

appellate districts within the same state—the general trend apears to support the assumptions this Court made in *Penson*: the requirements of the *Anders* brief encourage counsel to search the record more diligently for issues that can be argued on the merits.

CONCLUSION

Given the current caseload of the California Courts of Appeal, and the diseconomies inherent in the *Wende* procedure, the judicial process, as well as fairness, would be better served by requiring counsel to identify the issues explored as well as the record citations relating to those issues. Diligent counsel will have already performed (and will have been compensated for) the task reassigned to the reviewing court. Moreover, by making it too easy for counsel to submit no-merit briefs, California's *Wende* procedure may result in fewer legitimate briefs on the merits reaching the courts.

Respectfully submitted,

GREGORY R. SMITH *
IRELL & MANELLA LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067
(310) 277-1010
Counsel for Amici Curiae

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* Counsel of Record